Mustapah bin Puteh v Basit bin Mohammad

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–28 OF 1998
SURIYADI J
11 JANUARY 1999

Tort *— Negligence — Res ipsa loquitur — No rebuttal of the presumption — Defendant elected not to call any witness — Whether this necessarily means that defendant is 100% liable*

Damages *— Quantum — Death — Dependency claim*

On 25 January 1997, a collision occurred between the appellant's son who was riding motorcycle No WBX 9587 and the respondent who was riding motorcycle No NAM 183. The collision resulted in the death of the former. The appellant subsequently commenced an action under s 7(3)(iv)(d) of the Civil Law Act 1956 against the respondent. In his pleadings the appellant, inter alia, pleaded the maxim of res ipsa loquitur. In his defence, the respondent made no specific reply against this plea. At the hearing, the appellant called for only one witness, who merely tendered the relevant sketch map of the place of the accident. The respondent elected not to call any witness which led the judge to adjudicate primarily on the appellant's evidence. The judge found the respondent 50% liable. The finding and the issue of quantum brought about this appeal. The appellant contended that the judge should have found the respondent 100% liable as the plea of res ipsa loquitur was never rebutted by the respondent.

Held, dismissing the appeal and modifying the quantum:

(1) As regards the maxim of res ipsa loquitur, the presumption that arose was that the collision was totally contributed by the respondent's negligence. This presumption was rebuttable. The onus of the whole case was on the plaintiff (appellant). As the maxim is only a rule of evidence, the onus that had shifted to the defendant (respondent) only relates to that piece of evidence (see pp 542F–I and 543A–B); *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] CLJ 1 followed. If the sessions court judge had not taken into consideration the plea of res ipsa loquitur, the appellant's case would have been dismissed outright. It must have been after deciding that res ipsa loquitur did apply that the judge concluded the respondent's liability had been diluted by half due to the contents of the sketch plan. It would have been clearly wrong for the sessions court judge to consider the maxim of res ipsa loquitur in isolation. All available evidence must be assessed and considered in totality (see p 543E–G); *Ngooi Kim Chong v Subramaniam a/l Maruthan & Anor* [1997] 1 CLJ 799 followed.

(2) The cross-examination of the appellant's witnesses failed to disprove the monthly earnings of the deceased or discredit the truth of the appellant's monthly receipt from the deceased or his monthly expenses (see p 544D).

[Bahasa Malaysia summary

Pada 25 Januari 1997, satu perlanggaran telah berlaku di antara anak lelaki perayu yang menunggang motosikal No WBX 9587 dan penentang yang menunggang motosikal No NAM 183. Perlanggaran tersebut telah menyebabkan kematian anak perayu. Perayu seterusnya telah memulakan tindakan di bawah s 7(3)(iv)(d) Akta Undang-Undang Sivil 1956 terhadap penentang. Di dalam pliding beliau, perayu, antara lain, telah memplidkan ungkapan res ipsa loquitur. Di dalam pembelaannya, penentang telah tidak membuat sebarang balasan tertentu terhadap pliding tersebut. Semasa perbicaraan, perayu telah memanggil seorang saksi sahaja yang telah hanya mengemukakan pelan lakaran tempat kemalangan tersebut. Penentang telah memilih untuk tidak memanggil sebarang saksi yang menyebabkan hakim membuat keputusan berdasarkan keterangan perayu. Hakim telah mendapati penentang 50% bertanggungan. Keputusan tersebut dan isu kuantum membawa kepada rayuan ini. Perayu menghujahkan bahawa hakim sepatutnya mendapati penentang 100% bertanggungan kerana pliding res ipsa loquitur telah tidak disangkal oleh penentang.

Diputuskan, menolak rayuan dan menukar kuantum:

(1) Merujuk kepada ungkapan res ipsa loquitur, anggapan yang telah timbul ialah perlanggaran tersebut telah disebabkan sepenuhnya oleh kecuaian penentang. Anggapan ini boleh disangkal. Beban keseluruhan kes ini ialah pada plaintif (perayu). Oleh kerana ungkapan ini hanyalah rukun keterangan, maka beban yang telah berpindah kepada defendan (penentang) hanyalah berkaitan dengan keterangan tersebut (lihat ms 542F–I dan 543A–B); *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] CLJ 1 diikut. Jika hakim mahkamah sesyen telah tidak menimbangkan ungkapan res ipsa loquitur, kes perayu tentulah telah ditolak. Ia mestilah setelah hakim memutuskan bahawa res ipsa loquitur boleh dipakai yang membuat hakim menyimpulkan bahawa liabiliti penentang telah dicairkan sebanyak separuh kerana kandungan pelan lakaran tersebut. Adalah jelas salah bagi hakim menimbangkan res ipsa loquitur secara berasingan. Kesemua keterangan mestilah dinilai dan dipertimbangkan secara keseluruhan (lihat ms 543E–G); *Ngooi Kim Chong v Subramaniam a/l Maruthan & Anor* [1997] 1 CLJ 799 diikut.

(2) Pemeriksaan balas saksi-saksi perayu telah gagal untuk membuktikan sebaliknya pendapatan bulanan si mati atau mencabar kebenaran penerimaan bulanan perayu daripada si mati atau belanja bulanannya (lihat ms 544D).]

Notes

For cases on res ipsa loquitur, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 601–620.

A For a case on death, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 738.

Cases referred to

Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392 (refd)
B *Che Jah bte Mohamed Ariff v CC Scott* [1952] MLJ 69 (refd)
Fatimah bte Derakman v Wan Jusoh bin Wan Kolok & Anor [1994] 4 CLJ 537 (refd)
Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor [1997] CLJ 1 (refd)
C *Moore v R Fox & Sons* [1956] 1 QB 596 (refd)
Ngooi Kim Chong v Subramaniam a/l Maruthan & Anor [1997] 1 CLJ 799 (refd)

Legislation referred to

D Civil Law Act 1956 s 7(3)(iv)(d)

Joshua T Sambanthan (*Lawrence Pereira & Partners*) for the appellant.
Vimalarani Sothiratnam (*Taye & Co*) for the respondent.

Suriyadi J: On 25 January 1997 at about 9.30pm, a collision occurred between the appellant's son, who was riding motorcycle No WBX 9587 and E the respondent who rode motorcycle No NAM 183. As a result of that accident, the appellant's son ('the deceased') died. The appellant subsequently commenced an action under s 7(3)(iv)(d) of the Civil Law Act 1956, against the respondent. In his pleadings the appellant, inter alia, pleaded the maxim of res ipsa loquitur. In his defence, for some unknown F reason, the respondent made no specific reply against this plea.

At the hearing, as regards the accident proper, the appellant adduced only one useful witness, ie the investigating officer, to supply some idea of the place of accident. Sadly, his role was restricted merely to the tendering of the relevant sketch map. The scantiness of the evidence adduced by the appellant was evident, as not even the travelling direction of the deceased G and the respondent was successfully divulged. The defendant not unreasonably, assumed that the appellant had not successfully made out a prima facie case, and correspondingly elected not to call any witness. In law, the effect of this election is that, in the event the judge accepts the plaintiff's evidence, then the defendant is disallowed from calling any rebuttal H evidence. Indisputably, it must have been due to the acceptance by the sessions court judge of the plaintiff's case, that the case be determined abruptly. Thenceforth the learned judge had no choice but to adjudicate primarily on the plaintiff's evidence. It is trite law that if the defence does not produce any evidence to rebut the plaintiff's case, then the latter's evidence must be accepted (*Fatimah bte Derakman v Wan Jusoh bin Wan* I *Kolok & Anor* [1994] 4 CLJ 537).

The repercussion of this foolhardy course of action ie the election, was that a 50% liability finding was pronounced against the respondent by the

judge. At the conclusion of the appeal before me, I concluded that the sessions court judge must have been satisfied with the partial success of the plaintiff, in adducing some evidence of the respondent's culpability. The explanation will follow later. This generous finding of 50% liability against the respondent, and the issue of quantum, did not find favour with the appellant as a notice of appeal was filed by him subsequently. Before me, he canvassed that the sessions court judge should have found the respondent 100% liable, as the plea of res ipsa loquitur was never rebutted by the respondent.

Having heard the appeal, I left the liability finding undisturbed, though not the quantum. I modified the quantum by making these changes, namely:

(1) RM26,880 for the dependancy claims compared to the outright rejection of the general damages by the sessions court judge. This sum was derived after deducting RM320 (expenses of appellant) from RM600 received from the deceased, which left RM280, and thereafter multiplying it with the multiplicand of eight years (96 months). Mathematically, it will appear thus:

$$RM280 \times 8 \times 12 = RM26,800;$$

(2) RM1,500 for the burial expenses;

(3) RM20 for the search expenses;

(4) RM50 for documents; and

(5) costs.

The deliberation of the maxim of res ipsa loquitur took up much of the court's time during the appeal as the appellant's counsel continuously and doggedly pressed home this point. In brief, he postulated that the learned sessions court judge never took this maxim into consideration, as otherwise he would not have adjudicated this percentage. Res ipsa loquitur, in simple English means 'the thing speaks for itself', and is part of the rule of evidence. Simply put, when a plaintiff raises this maxim, the mere fact that an accident had occurred, must raise the inference of the defendant's negligence, and as such a prima facie case has been proved (*Dictionary of Law* (4th Ed) by LB Curzon at p 334). *Jowitt's Dictionary of English Law* (2nd Ed) at p 1557, explains res ipsa loquitur in the following terms:

> ... that a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant, or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety (per Megaw LJ in *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 (gas explosion injuring householder)).

Reverting to this maxim, 'the thing' must mean the relevant collision that occurred on 25 January 1997. And the presumption that arose was that the accident was totally contributed by the negligence of the defendant. This

presumption, on the other hand is rebuttable fully or partially. At the earliest of stages, I must reiterate that, as this maxim is merely a rule of evidence, the onus that has shifted to the respondent, only relates to that piece of evidence (*Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] CLJ 1). It must be borne in mind that the burden of proof, regarding the whole case never shifts but remains throughout on the shoulders of the plaintiff, ie the appellant here. The consequential question for determination therefore would be, whether the defendant had succeeded in disproving that presumption of negligence fully or partially, or had given an explanation of the cause of accident, which did not connote negligence by him (*Black's Law Dictionary* (6th Ed) p 1305; *Moore v R Fox & Sons* [1956] 1 QB 596). If the defendant does succeed in the accepted legal sense, then it means the burden has shifted back to the plaintiff, who then will have to prove the defendant's negligence by some other manner. Jobling J in *Che Jah bte Mohamed Ariff v CC Scott* [1952] MLJ 69, had occasioned to say:

> From all these cases it is quite clear that in a case of res ipsa loquitur the onus is thrown on the defendant to give a reasonable explanation as to how the accident occurred. If defendant gives a reasonable explanation the onus is then thrown back on the plaintiff to prove negligence.

At the close of the defendant's case, in this case the respondent's, the judge, as in any civil case, must assess the case as a whole, and then conclude whether the plaintiff has proven his case.

Perusing the evidence, I could not but conclude that if the sessions court judge had not taken into consideration the plea of res ipsa loquitur, then the appellant's case would have been dismissed outright. Certainly no apportionment of liability would have ensued. As it were, it must have been after deciding that res ipsa loquitur did apply, having borne in mind its 'rule of evidence' effect, conclude that the liability of the respondent had been diluted by half due to the contents of the sketch plan. It would have been clearly wrong for the sessions court judge to consider the maxim of res ipsa loquitur in isolation. This is so, as all the available evidence must be assessed and considered in totality (*Ngooi Kim Chong v Subramaniam a/l Maruthan & Anor* [1990] 1 CLJ 799). No doubt the respondent could have helped, as he survived that collision, unlike the appellant who was never at the scene (*Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 at p 399). Unfortunately this was not to be, due to the respondent's unfortunate election. On the other hand, there is no legal impediment known to law that could prevent the sessions court judge from seeking recourse from the plaintiff's very own evidence, for guidance prior to his final adjudication.

That 50% liability apportionment was not unreasonable, as the sketch plan showed that both the motorcycles were found somewhere at the left and middle portion of the road. No explanation surfaced as to why the road was not delineated by any broken continuous line. The position of the glass strewn around the motorcycles, were of no help either, as the place of impact of the vehicles need not necessarily be the very spot where the broken glasses had collected. Whether by the law of physics or logic, after a

collision, the shattered glass would invariably be flung and scattered some distance away from the place of impact.

The damages to both the motorcycles may have played a major role in persuading the sessions court judge in not completely exonerating the deceased of some contributive liability. The much more extensive damages detected from the deceased's motorcycle, as testified by PW1, must have precipitated the judge to conclude that the latter was not totally blameless. It could be indicative of the deceased having ridden faster than the respondent, and then suffering the indignity of having been flung further away comparatively after the collision, hence those damages and the liability findings.

As regards the quantum, I was surprised at the manner and the amount adjudged by the presiding judge, in spite of the non-too convincing cross-examination by the respondent, particularly on the issue of the income and expenses of the deceased and the appellant respectively. It was crystal clear that the deceased earned about RM1,200–RM1,500 per month, as evinced by the testimony of PW2 at p 47, and of PW3 at p 50. The cross-examination of the appellant's witnesses failed to disprove the monthly earnings of the deceased, or discredit the truth of the appellant's receipt of RM600 from the deceased monthly, and/or his monthly expenses of RM320.

To regurgitate, due to those failures it was thus highly necessary for me to only disturb the judge's finding as regards the issue of quantum and no more, with costs.

Appeal dismissed; quantum modified.

Reported by Zahid Taib